INDEX

CITATIONS

Cases:

247-318—67——1

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 249

WYATT TEE WALKER, ET AL., PETITIONERS

v.

CITY OF BIRMINGHAM ETC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This case presents a question of significant importance: whether the rule that one may not ordinarily test by disobedience the validity of an injunction issued by a court of competent jurisdiction applies in the context of the peaceful exercise of First Amendment rights—more particularly, when their meaningful exercise might otherwise become forfeited by lapse of time. Although the issue is a recurring one, this Court has never had occasion to resolve it. See note 10, *infra*, p. 10.

The interest of the United States in the question is sufficiently indicated by the Court's order in *Fields* v. *City of Fairfield*, 372 U.S. 940, inviting the govern-

ment to file a brief in that case, which seemed to present the same issue, albeit it was ultimately decided on a narrower ground. See 375 U.S. 248. Of course, the United States is deeply concerned that its citizens enjoy their constitutional rights free of undue restraint. At the same time, it is strongly committed to securing respect for judicial decrees. Accordingly, we deem it appropriate to suggest an accommodation of these vital interests. Although the instant case involves contempt of a State court decree, the decision will inevitably affect the rule to be followed by the federal courts—a matter of direct concern to the United States. See, *e.g.*, *United States* v. *United Mine Workers*, 330 U.S. 258.

STATEMENT

This case involves the validity of the convictions for criminal contempt of eight civil rights leaders for their role in demonstrations in Birmingham, Alabama in April 1963. Specifically, petitioners were found to have sponsored or engaged in street parades without a permit on Good Friday and Easter Sunday, April 12 and 14, in violation of an *ex parte* temporary injunction issued by the Circuit Court of Jefferson County, Alabama. The controlling question, in our view, is whether, in the contempt proceedings, petitioners should have been permitted to defend on the ground of the invalidity of the judicial order.

On April 3 and 4 of that year, sit-in demonstrations were held in certain stores in that City.[1] A municipal

[1] Affidavits of Police Captains G. V. Evans and George Wall, accompanying the Bill of Complaint, R. 39–43.

ordinance[2] required a permit for any parade or procession or other public demonstration on the streets of the city, and the record indicates that, commencing on April 3, efforts were made to obtain such a permit for future demonstrations. At the contempt trial, the petitioners atempted to show that, on April 3, Mrs. Lola Hendricks, a representative of the Alabama Christian Movement, sought a permit from Commissioner Eugene T. Connor. An objection to her testimony was sustained, but Mrs. Hendricks did state:

> I asked Commissioner Connor for the permit, and asked if he could issue the permit, or other

---

[2] The pertinent ordinance, § 1159 of the Birmingham General City Code of 1944, provided as follows:

> It shall be unlawful to organize or hold, or to assist in organizing or holding, or to take part or participate in, any parade or procession or other public demonstration on the streets or other public ways of the city, unless a permit therefor has been secured from the commission.
>
> To secure such permit, written application shall be made to the commission, setting forth the probable number of persons, vehicles and animals which will be engaged in such parade, procession or other public demonstration, the purpose for which it is to be held or had, and the streets or other public ways over, along or in which it is desired to have or hold such parade, procession or other public demonstration. The commission shall grant a written permit for such parade, procession or other public demonstrations, prescribing the streets or other public ways which may be used therefor, unless in its judgment the public welfare, peace, safety, health, decency, good order, morals or convenience require that it be refused. It shall be unlawful to use for such purposes any other streets or public ways than those set out in said permit.
>
> The two preceding paragraphs, however, shall not apply to funeral processions.

> persons who would refer me to, persons who would issue a permit. He said, "No, you will not get a permit in Birmingham, Alabama to picket. I will picket you over to the City Jail," and he repeated that twice [R. 355].

Two days later, on April 5, Petitioner Shuttlesworth, sent a telegram to Commissioner Connor, requesting on behalf of the Alabama Christian Movement a permit to conduct picketing on April 5 and 6 (R. 416). Connor replied that only the full commission could grant a permit; he insisted that Shuttlesworth "not start any picketing on the streets [of] Birmingham" (R. 415). During the hearing, the petitioners attempted to prove that, despite the language of the ordinance, the general practice was for permits to be issued, not by the Commission, but by the City Clerk at the request of the traffic department.[3]

On April 6 and 7, groups of Negroes were arrested for having paraded without a permit.[4] On April 9 and 10, further demonstrating, parading, and picketing took place, and additional arrests were made. Shortly after 9:00 p.m. on April 10, at the request of the City of Birmingham and without notice or hearing, the trial court issued a temporary injunction which prohibited the petitioners from engaging in a variety of activities, including mass parading without a permit (R. 37). The decree "temporarily enjoined" the following activities (R. 38):

> * * * engaging in, sponsoring, inciting or encouraging mass street parades or mass proces-

[3] The trial court sustained objection to this line of inquiry (R. 283).

[4] See *supra*, n. 2.

> sions or like demonstrations without a permit, trespass on private property after being warned to leave the premises by the owner or person in possession of said private property, congregating on the street or public places into mobs, and unlawfully picketing business establishments or public buildings in the City of Birmingham, Jefferson County, State of Alabama or performing acts calculated to cause breaches of the peace in the City of Birmingham, Jefferson County, in the State of Alabama or from conspiring to engage in unlawful street parades, unlawful processions, unlawful demonstrations, unlawful boycotts, unlawful trespasses, and unlawful picketing or other like unlawful conduct or from violating the ordinances of the City of Birmingham and the Statutes of the State of Alabama or from doing any acts designed to consummate conspiracies to engage in said unlawful acts of parading, demonstrating, boycotting, trespassing and picketing or other unlawful acts, or from engaging in acts and conduct customarily known as "kneel-ins" in churches in violation of the wishes and desires of said churches. * * *

The first of petitioners to be served with the *ex parte* injunction received it at 1:00 a.m. on April 11 (R. 46). Later that day, three of the petitioners, Martin Luther King, Jr., Fred L. Shuttlesworth, and Ralph D. Abernathy issued a press release to the effect that they would be unable to obey the injunction (R. 409).

A march took place on Good Friday, April 12, beginning at a church in the Negro section of the City and destined for the City Hall (R. 207). The police—advised in advance by one of the petitioners of the

time and route of the march (R. 176)—blocked the streets to traffic in the vicinity of the designated church, and whites were not permitted to enter the Negro area (R. 146, 154, 207). The march consisted of approximately fifty persons and was led by Martin Luther King, Jr., Ralph Abernathy, and Fred L. Shuttlesworth. This group walked out of the church and proceeded down the sidewalk. Prior to the march, a large crowd of Negroes had gathered outside the church, but these onlookers remained separate from the procession led by the three ministers (R. 147). Several blocks from the church, the marchers were stopped by the police, and most of them, including the three leaders, were arrested for parading without a permit in violation of the Birmingham ordinance (R. 168).[5] Petitioners Abernathy, Shuttlesworth and Martin Luther King were jailed (R. 335).

On Saturday, April 13, a meeting was held in which plans were made for a demonstration on the next day, Easter Sunday, and requests were made for volunteers "to walk" on Sunday (R. 301). As with the march on Good Friday, the police were informed in advance (R. 154). The police blocked the streets to traffic and white pedestrians in the vicinity of the

---

[5] One of the persons then arrested, Fred L. Shuttlesworth, was tried for and convicted of violating the parade ordinance. On appeal, however, the Alabama Court of Appeals reversed the conviction, holding that (1) the ordinance was void on its face because it failed to set forth meaningful standards for issuance of permits, (2) the ordinance had been applied in an unconstitutional, discriminatory manner, and (3) the City failed to prove violation of the ordinance. 180 So. 2d 114, certiorari granted by the Alabama Supreme Court, January 20, 1966.

church where the petitioners and their followers met (R. 154). Several hundred people assembled at the church (R. 149). When those who had been inside emerged from the church, they were joined by others who had been waiting outside (R. 215), and then all proceeded to walk in the same direction. Eventually, the streets and the sidewalks were filled with people (R. 229). After the procession moved several blocks, it was stopped by the police and approximately twenty persons, including the five petitioners who participated in that march, were arrested for parading without a permit (R. 168, 267).

On Monday, April 15, petitioners moved for dissolution of the injunction (R. 65). Later the same day, the City initiated criminal contempt proceedings against petitioners and seven others, and the hearing was held one week later, on April 22 (R. 82). At that hearing, the judge ruled that he would consider the contempt matter first (R. 139) and the record does not show that any further action was ever taken on the motion to dissolve the injunction. In the contempt proceeding the trial court, for the most part, limited the evidence to two questions, whether the actions of the defendants violated the injunction and whether they had received notice of the injunction. As stated above, the court excluded all evidence tending to show that the parade ordinance was applied in a discriminatory manner. The unreported opinion of the trial court notes, in passing, that the ordinance "is not invalid upon its face" and states that if the defendants had wished to attack the manner in which

the permit ordinance was applied to them, they should have filed a timely motion to dissolve the injunction. The opinion goes on to assert: "Since this course of conduct was not sought by the defendants, the Court is of the opinion that the validity of its injunction order stands upon its prima facie authority to execute the same" (R. 422). Accordingly, on April 26, the circuit court issued a decree holding some of the defendants[6] guilty of criminal contempt. Each was sentenced to five days in jail and was fined fifty dollars (R. 424–425).

The Alabama Supreme Court affirmed the convictions of the eight petitioners, 181 So. 2d 493, holding that they had knowingly violated the terms of the injunction[7] and that the validity of the injunction and of the underlying ordinance could not be challenged in a contempt proceeding. Relying on *United States* v. *United Mine Workers,* 330 U.S. 258, the State Supreme Court held that "the circuit court had the duty and authority, in the first instance, to determine the validity of the ordinance, and, until the decision of the circuit court is reversed for error by orderly review, either by the circuit court or a higher court, the orders of the circuit court based on its decision are to be respected and disobedience of them is contempt of its lawful authority, to be pun-

[6] Four defendants were acquitted; the circuit court held that the City had failed to prove their guilt.

[7] The Alabama Supreme Court determined that three of the other defendants convicted had not received notice of the injunction and accordingly quashed the judgments holding them in contempt.

ished." A petition for certiorari to review that judgment was granted by this Court on October 10, 1966.

ARGUMENT

As we view it,[8] the case presents the issue whether the so-called *Mine Workers* doctrine—that one cannot test the validity of an injunction by disobedience—may be applied when the order violated is void and broadly suppresses the exercise of First Amendment rights, in a context that permits no effective alternative means of expression and no timely opportunity to obtain relief from the ban. We think not.

The State courts are, of course, free to disregard the *Mine Workers* rule and permit the contemnor in every case to defend on the ground of the invalidity of the order. See *Donovan* v. *Dallas*, 377 U.S. 408, 414; *N.A.A.C.P.* v. *Alabama*, 357 U.S. 449, 455–458. On the other hand, within constitutional limits, they may follow the federal practice exemplified in the *Mine Workers* decision. Alabama apparently has

[8] We assume that here, unlike *Fields* v. *City of Fairfield*, 375 U.S. 248, there is evidence establishing a violation of the injunction. So saying, however, we do not mean to disparage petitioners' argument to the contrary. See Brief for the Petitioners, pp. 55–59. Nor do we comment upon the contention on behalf of petitioners King, Abernathy, Walker and Shuttlesworth that they were improperly punished, in part, on account of constitutionally protected speech (*id.* at 71–76), or the claim of petitioners Hayes and Fisher that they did not have notice of the injunction (*id.* at 77–81)—because, in any event, the broader question discussed here must be reached with respect to the two remaining petitioners.

chosen the latter course.[9] Accordingly, the question here is whether foreclosing a challenge to the underlying order in criminal contempt proceedings is consistent with the requirements of due process—binding on State and federal courts alike—when the consequences of applying that rule are as serious as they are in this case. See *In re Green*, 369 U.S. 689, 693. Whatever the proper limits of the doctrine that one must obey an invalid injunction so long as it stands—a question largely unresolved in this Court[10]—we

---

[9] We assume that the Alabama Supreme Court had, prior to this case, made clear that the *Mine Workers* rule would be applied as a matter of State law; otherwise, the validity of the order underlying the contempt sentence would be open in this Court without deciding the threshold question discussed here. *N.A.A.C.P.* v. *Alabama*, 357 U.S. 449. As petitioners point out (Brief, pp. 49–50), our premise may be debatable. Compare *Fields* v. *City of Fairfield*, 143 So. 2d 177, reversed on other grounds, 375 U.S. 248, in which the Alabama Supreme Court seemed to view the constitutionality of the order "on its face" as a question open in criminal contempt proceedings. See, also, *Ex Parte Abercrombie*, 172 So. 2d 43, 45.

[10] The only decision in this Court apparently condoning an absolute rule that violation of any void court order is punishable as a contempt is *Howat* v. *Kansas*, 258 U.S. 181. Insofar as it is there held that the rule suffers no exception, the holding has been expressly or impliedly repudiated in later cases. *E.g.*, *United States* v. *United Mine Workers*, 330 U.S. 258, 293; *In re Green*, 369 U.S. 689; see, also, *Johnson* v. *Virginia*, 373 U.S. 61; *Hamilton* v. *Alabama*, 376 U.S. 650; *Stevens* v. *Marks*, 383 U.S. 234. To be sure, *Howat* v. *Kansas* was quoted as "impressive authority" in the plurality opinion in *Mine Workers*, 330 U.S. at 293–294; but that *dictum*—unnecessary to the decision of the case and somewhat inconsistent with the exception already recognized in the opinion with respect to orders entered by courts whose claim to jurisdiction is "frivolous and not substantial" (*id.* at 293)—was apparently subscribed by only a

believe that, in circumstances like these, an appropriate accommodation of the important policy of requiring respect for court orders with the constitutional prohibition against undue abridgment of the rights secured by the First Amendment must permit the violator to defend his contempt on the ground that the judicial order is invalid.

1. There is, of course, no doubt that the injunction in suit controlled the exercise of First Amendment rights. So far as here relevant, it expressly prohibited petitioners and their adherents from participating in, or advocating, any "mass street parade or mass procession or like demonstration without a permit," and from "congregating on the street or public places into mobs,'" anywhere in the City of Birming-

---

minority of the Court. Compare the concurring opinion of Mr. Justice Frankfurter on this point, which expressly endorses no more than the actual holding of that case and of *United States* v. *Shipp*, 203 U.S. 563—that an interim order entered to preserve the *status quo* pending decision of an arguable question of jurisdiction must be obeyed. 330 U.S. at 307–312, 328. Mr. Justice Black and Mr. Justice Douglas did not reach the question (*id.* at 330), and Justices Murphy and Rutledge expressly dissented from the Court's holding on this issue. *Id.* at 339–342, 351–363.

At all events, this Court has never expressly resolved the question in a First Amendment context. *Howat* v. *Kansas*, whatever its subsisting force, involved an order prohibiting a labor strike, like *Mine Workers*. The order violated in *Shipp* merely postponed execution of a death sentence. We do not believe *Thomas* v. *Collins*, 323 U.S. 516, finally resolves the question because it appears that the local law applied by the State courts permitted the contemnor to defend on the ground of the invalidity of the order. 323 U.S. at 524. See p. 9, *supra*. Moreover, the decision antedates *Mine Workers*. Accordingly, we treat the question presented here as *res nova* in this Court.

ham, at any time, in any manner—no matter how orderly and peaceful—and regardless of the purpose or probable effect—whether to disrupt traffic or provoke a disturbance, or simply as a form of expression or quiet protest against unjust discrimination. Whether or not such a broad restraint is permissible—we think it plainly is not, *infra*, pp. 15–17—there can be no question that the injunction reaches into the sensitive area of the First Amendment. To be sure, mere speech is not inhibited. But "the right of the people peaceably to assemble" and the right "to petition the Government for a redress of grievances"—also safeguarded by the Amendment—are directly involved. See, *e.g.*, *Stromberg* v. *California*, 283 U.S. 359; *De Jonge* v. *Oregon*, 299 U.S. 353; *Thornhill* v. *Alabama*, 310 U.S. 88; *Edwards* v. *South Carolina*, 372 U.S. 229; *Cox* v. *Louisiana*, 379 U.S. 536; *Brown* v. *Louisiana*, 383 U.S. 131, 141–142 (opinion of Fortas, J.), 146 (concurring opinion of Brennan, J.). Moreover, in the circumstances prevailing when the injunction was issued, its prohibition on "parades" "processions" and "demonstrations," directed against the present petitioners, plainly encompassed a suppression of activities that would be "as much a part of the 'free trade in ideas' * * * as is verbal expression, more commonly thought of as 'speech.'" *Garner* v. *Louisiana*, 368 U.S. 157, 201 (Harlan, J., concurring); see, also, *Cox* v. *Louisiana*, *supra*.

The First Amendment context of the case, it seems to us, bears importantly on the appropriateness of ap-

plying the *United Mine Workers* rule here. The special care with which the Constitution protects the exercise of those freedoms needs no elaboration. It is sufficient to note that stricter standards are imposed on regulations which affect the exercise of First Amendment rights in order to guard against the dangers of overbreadth, vagueness, and excessive discretion (*e.g., Cox* v. *Louisiana,* 379 U.S. 536, 551–552, 557–558; *Baggett* v. *Bulitt,* 377 U.S. 360, 372–373; *N.A.A.C.P.* v. *Button,* 371 U.S. 415, 432–433; *Cramp* v. *Bd. of Public Instruction,* 368 U.S. 278, 287–288; and cases there cited), and that it is in this area alone that the Court has permitted challenges to a statute or regulation on its face by persons whose conduct might well be reached under a more narrowly drawn law, waiving or relaxing the usual rules of standing, prematurity, exhaustion of administrative remedies, and abstention. See *Dombrowski* v. *Pfister,* 380 U.S. 479, 486–487, 489–492; *Freedman* v. *Maryland,* 380 U.S. 51, 56; and cases there cited. Without exploring all of the reasons behind this special concern for the guarantees of the First Amendment, it is obvious that some of them, at least, are operative whether the right is threatened by a civil regulation, a criminal statute or a judicial order, and whether the claim of constitutional immunity is presented before or after the attempt to exercise the right.

Thus, the policy severely limiting prior restraints on the exercise of First Amendment rights (*e.g., Near* v. *Minnesota,* 283 U.S. 697, 713–720; *Staub* v. *City of Baxley,* 355 U.S. 313, 322–325, and cases there

cited; *Freedman* v. *Maryland,* 380 U.S. 51, 57–60) is not easily reconciled with a rule that requires unquestioning obedience to judicial decrees with the same effect—especially when the order is entered *ex parte* and the burden of seeking relief is placed on the victim of the restraint. See *Freedman* v. *Maryland, supra,* 380 U.S. at 58; cf. *Speiser* v. *Randal,* 357 U.S. 513, 526. And the considerations underlying the unique rule in First Amendment cases that allows "One who might have had a license for the asking * * * [to] call into question the whole scheme of licensing when he is prosecuted for failure to procure it" (*Thornhill* v. *Alabama,* 310 U.S. 88, 97; see *Staub* v. *City of Baxley, supra,* 355 U.S. at 319, and cases there cited) would seem to argue for a like exception for those who, in a comparable situation, test an unconstitutional injunction by disobedience, rather than applying for dissolution or reversal of the order.

So, also, some relaxation of the *Mine Workers* rule in a First Amendment context is suggested by the decisions which recognize that the rights of speech and assembly—fundamental and vital, but fragile and easily stifled—require "breathing space to survive." *N.A.A.C.P.* v. *Button, supra,* 371 U.S. at 433, and cases there cited. And, finally, to require deferral of the opportunity to vindicate First Amendment rights until the overly restrictive judicial order has been set aside or modified would seem at odds with the principle that, in this area, otherwise impermissibly broad and premature challenges must be allowed, lest the exercise of the rights be "chilled" and "all

society" become the loser. *Dombrowski* v. *Pfister, supra*, 380 U.S. at 486–487, 490–492; *Smith* v. *California*, 361 U.S. 147, 151.

Accordingly, it is arguable that the *Mine Workers* rule should have no application when the judicial order violated controls the exercise of First Amendment rights, at least when, as here (see *infra*, pp. 19–21), the injunction does no more than purport to convert a statutory prohibition—subject to challenge after violation—into an invulnerable court decree. We eschew that mechanical equation, however. Our submission is, rather, that the First Amendment context of the case attenuates the policies behind the *Mine Workers* rule, and that the nature of the rights affected, viewed *in combination with other factors* presently to be discussed, requires an exception here.

2. Among the additional considerations militating against application of the *Mine Workers* rule here is the plain invalidity of the injunction. We have already noticed the unnecessarily broad sweep of the order; as applied to petitioners, it effectively proscribed all large parades and congregations without exception. To say the least, such a pervasive restraint in the First Amendment area is of dubious constitutionality. See *Cox* v. *Louisiana, supra*, 379 U.S. at 555, n. 13. Especially so, one would suppose, when the injunction suppresses peaceful protests against invidious discrimination in a politically "closed society" where other avenues of redress are barred and the danger of stifling all expression of the unpopular

views is particularly acute.[11] See *Dombrowski* v. *Pfister, supra,* 380 U.S. at 486–489; *N.A.A.C.P.* v. *Button, supra,* 371 U.S. at 429–430, 435–436; *Bates* v. *Little Rock,* 361 U.S. 516, 523–524. As Judge Johnson said two years later in enjoining interference with a march from Selma to Montgomery, Alabama (*Williams* v. *Wallace,* 240 F. Supp. 100, 106):

> The law is clear that the right to petition one's government for the redress of grievances may be exercised in large groups. Indeed, where, as here, minorities have been harassed, coerced and intimidated, group association may be the only realistic way of exercising such rights. * * *
>
> * * * * *
>
> * * * it seems basic to our constitutional principles that the extent of the right to assemble, demonstrate and march peaceably along the highways and streets in an orderly manner should be commensurate with the enormity of the wrongs that are being protested and petitioned against. * * *

The order is plainly void for another reason. The injunction in suit, in pertinent part, prohibited pa-

---

[11] According to the 1963 Report of the United States Commission on Civil Rights (p. 32), only 11.7% of the Negroes of voting age in Jefferson County (which includes Birmingham) were registered in 1962.

The existence of a caste system in Birmingham at the time is sufficiently attested by the provisions of local law imposing "separation of the races" in restaurants, prohibiting Negroes and whites to "play together * * * in any game of cards," and requiring "separate toilet facilities" for each race. See *General Code of City of Birmingham* (1944), §§ 369, 597; *Building Code of City of Birmingham* (1944), § 2002.1, quoted at p. 3a of the Brief for the Petitioners.

rades and demonstrations "without a permit," thereby incorporating the parade ordinance of the City of Birmingham. While that provision could offer no hope of relief to petitioners in the circumstances (see *infra*, pp. 23–24), it betrays the unconstitutional licensing system that the injunction implemented. Indeed, as already noted, Section 1159 of the Birmingham Code proscribes all street parades or demonstrations "unless a permit therefor has been secured" and further provides that such a permit may be refused by the municipal commission whenever "in its judgment the public welfare, peace, safety, health, decency, good order, morals or convenience" so require. The opportunities for discrimination under such loose standards is too obvious for elaboration—and we have it on good authority that the ordinance was so abused at the time of the activities in suit. See *Shuttlesworth* v. *City of Birmingham*, 180 So. 2d 114, 136–139.[12] But, in any event, the vesting of such discretion in public officials renders the whole licensing scheme "clearly unconstitutional." *Cox* v. *Louisiana*, *supra*, 379 U.S. 536, 557, and cases there cited.

To be sure, the mere invalidity of the injunction is no ground for avoiding the *Mine Workers* rule; as a practical matter, that doctrine comes into play only when the order in question is susceptible to attack on

---

[12] See, also, *1963 Report of the United States Commission on Civil Rights*, p. 112. Efforts to prove the discriminatory implementation of the parade ordinance in this case were prevented by the trial judge. See R. 281–285, 355.

the merits. Yet, the *Mine Workers* decision itself recognized an exception to the harsh command of blind obedience when the court acts wholly beyond its power. 330 U.S. at 293, 310. And the Due Process Clause of the Fourteenth Amendment forbids the State courts from imposing punishment for violation of an injunction entered in like circumstances. *In re Green, supra.* We submit that the constitutional policy against pervasive prior restraints on expression similarly requires a waiver of the strict rule when, as here, the judicial order on its face plainly collides with the First Amendment and threatens to stifle the exercise of rights within its protection.

3. Still other reasons argue for an exception to the *Mine Workers* rule in the present context. In several respects, this case is not clearly governed by the policies underlying the rule of "obey now; challenge later."

a. At the outset, we note that the order in suit, insofar as it implements a criminal statute, is at the periphery of the injunctive power. Equity does not normally restrain criminal acts. *In re Debs,* 158 U.S. 564, 593. See, also, 4 Pomeroy, *Equity Jurisprudence* (5th Ed., 1941), § 1347 pp. 949–950. Especially is such relief traditionally barred to the sovereign itself, in the absence of express statutory authorization, since it is free to proceed by ordinary prosecution and should not lightly be permitted to deprive the defendant of constitutional guarantees by converting a crime into a contempt. McClintock, *Equity* (1936), § 159, pp. 285–288. To be sure, violation of a court

order may amount to criminal conduct and yet be punished as a contempt. *E.g., United States* v. *Barnett,* 376 U.S. 681; but see 18 U.S.C. 402, 3691. But it does not follow that, at the instance of the government, a court may properly restrain violation of a criminal statute in all circumstances.

The power is the more doubtful when the injunction is not a particularized order directed at specific action which, incidentally, would transgress the criminal law, but is, rather, a mere translation of the criminal statute into a judicial order—in effect, a command not to disobey the law. That such is our case is shown by a comparison of the injunction in suit with the terms of the municipal ordinance it implemented. So far as the order proscribed "parades," "processions," and "demonstrations," without a permit, it tracks, almost word for word, the language of the underlying ordinance. To be sure, the epithet "mass" is added, but that may be no more than an explication of the legislative text, which has been construed as inapplicable to small gatherings confined to the sidewalks. See *Shuttlesworth* v. *City of Birmingham, supra.* In these circumstances, it may be questioned whether the injunction—even conceding that it is within the equity power—was entitled to greater immunity from challenge than the ordinance it parrotted.

b. In another respect, also, the broadness of the injunction bears upon the propriety of treating a violation of its terms as a contempt which admits of no defense. Indeed, the rationale for exacting unquestioning obedience to court orders is, in part at

least, that—unlike general statutes whose application to the conduct in question is often debatable—an injunction is addressed to a particular person, controls specified acts, operates in a limited compass, and constitutes at least a preliminary adjudication in a concrete context. Here, however, many of those elements of the traditional injunction are lacking.

We have already noted that the order in suit is no more limited, so far as the conduct it restrains, than the underlying ordinance—itself an overbroad restraint on all use of the public streets for the purpose of group protests. Thus, the present order adds nothing to the definition of a "parade," "procession," or "demonstration"; those loose terms remained as vague as they were in the statute. Nor is the injunction confined as to time and place; like the ordinance, it bans parades at all times, on all streets, throughout the city—and does so for an indefinite period. See *infra,* pp. 22–23. Even the number of persons bound by the order is not strictly confined. It ran not only against the Alabama Christian Movement for Human Rights, its named leaders, and those acting in concert with them, but also to "all persons having notice" of the lawsuit. In the circumstances prevailing in Birmingham in April 1963—which were known to the entire Nation and even beyond our shores, and which, a month later, required the President to ready troops (see *United States* v. *Alabama,* 373 U.S. 545)—it seems fair to conclude that this description included at least the entire Negro population of Birmingham. And, finally, although it was

in effect a final ruling (*infra*, pp. 22–23), the extraordinary breadth of the order[13] and its *ex parte* character rob it of any serious claim to qualify as a considered adjudication on a concrete record.

These characteristics lend color to the contention that the injunction was void for vagueness (Brief for the Petitioners, pp. 45–47, 58–59). Cf. F.R.Civ.P., Rule 65(b), (d). But even assuming its validity—First Amendment objections aside—the present order surely merits less the immunity from challenge by a violator than a decree more narrowly confined.

---

[13] Although perhaps not directly involved in the contempt proceedings (but see Brief for the Petitioners, pp. 32, 56, 58), the balance of the injunction is relevant in judging its pervasive, shot-gun approach. After banning parades, processions and demonstrations without a permit, the order enjoins the following activities (R. 38):

> * * * trespass on private property after being warned to leave the premises by the owner or person in possession of said private property, congregating on the street or public places into mobs, and unlawfully picketing business establishments or public buildings in the City of Birmingham, Jefferson County, State of Alabama or performing acts calculated to cause breaches of the peace in the City of Birmingham, Jefferson County, in the State of Alabama or from conspiring to engage in unlawful street parades, unlawful processions, unlawful demonstrations, unlawful boycotts, unlawful trespasses, and unlawful picketing or other like unlawful conduct or from violating the ordinances of the City of Birmingham and the Statutes of the State of Alabama or from doing any acts designed to consummate conspiracies to engage in said unlawful acts of parading, demonstrating, boycotting, trespassing and picketing or other unlawful acts, or from engaging in acts and conduct customarily known as "kneel-ins" in churches in violation of the wishes and desires of said churches. * * *

c. Finally, application of the *Mine Workers* rule here does not serve the central rationale of that decision and of those on which it is premised—the need for absolute obedience to interim orders entered "to preserve existing conditions while [the court is] determining its own authority to grant injunctive relief." 330 U.S. at 293.[14]

Mr. Justice Frankfurter explicated the reason of the rule: "To say that the authority of the court may be flouted during the time necessary to decide is to reject the requirements of the judicial process." 330 U.S. at 311. The clearest illustration is the decision in *United States* v. *Shipp,* 203 U.S. 563, in which this Court held punishable violation of its own interim stay in a capital case because—whatever the ultimate decision with respect to its jurisdiction to entertain the appeal—the Court "from the necessity of the case" must have power to preserve the *status quo* pending its determination of the question. Certainly, that is not this case. Here, the injunction, while issued *ex parte* and labelled "temporary," operated indefinitely[15] and made no provision for a subsequent hearing on the merits. Realistically viewed, its purpose and effect were permanently to bar these petitioners and their adherents the use of the public streets of Birmingham for a protest demonstration. The order was, in no

---

[14] See note 10, supra, pp. 10–11.

[15] Under Alabama law, such an injunction, without stated term, never expires; it continues in effect until dissolved or made permanent. See *WGOK, Inc.* v. *WMOZ, Inc.*, 154 So. 2d 22. So far as appears, the "temporary" order in suit, issued in April, 1963, is still in force today.

sense, an interim stay designed to protect the court's jurisdiction of the case pending final adjudication.

As we have seen, the injunction dutifully copied the broad terms of an existing ordinance. Thus, short of holding that the ordinance of the City was unconstitutional, the court left nothing for a decision on the merits. Under local law, there was no basis for dissolution or modification of the order. On those facts, one hesitates to say the injunction should command blind obedience until ultimately reversed on appeal—perhaps in this Court. Cf. *N.A.A.C.P.* v. *Alabama*, 357 U.S. 449; *id.*, 360 U.S. 240; *id.*, 368 U.S. 16; *id.*, 377 U.S. 288. That would be asking far more of the victims of illegal restraint than merely to abide the normally brief delay while the trial court determines its jurisdiction.

Relevant, also, are the consequences of prolonged delay, on the one side, and potential injury to the public from interim violation of the order, on the other. Obviously, the balance here is in no sense comparable to what it was in *Shipp*, where a man's life was irrevocably taken. Nor does the exercise of First Amendment rights usually involve any risk of public injury comparable to that threatened in *Mine Workers*. On the other hand, a significant postponement of the opportunity to implement rights in this area often discourages or defeats their exercise altogether. At least, that appears to have been the situation here.

What is more, the injunction left petitioners no alternative avenue of protest. We have already noticed the sweeping ban of the order, copying, without nar-

rowing, the broad proscriptions of a municipal ordinance, and restraining also all other means of expression beyond pure speech.[16] In an important respect, the injunction offered even less opportunity for relief. The ordinance, on its face, invited an application to parade or demonstrate—an unconstitutional burden, to be sure, but, in theory, a possible escape valve. But that invitation was plainly revoked when the City, which grants the permits, itself obtained an injunction against the very activity for which the permits issue. There could be no clearer way of indicating to the petitioners that it would be futile to reapply for a permit.

We have elaborated the reasons which, in our view, forbid application of the so-called *Mine Workers* doctrine here. We suggest no disagreement with the actual holding of that case. Moreover, we affirmatively stress our belief that it is a salutary rule which generally requires that one test the validity of an order by the processes of judicial review rather than by a violation. The principle, however, is not unyielding. The concurrence of the factors to which we have alluded—the unconstitutionality of the underlying ordinance, the plain invalidity of the *ex parte* injunction based upon that ordinance, the practical unavailability of prompt relief, and the ultimate effect of a prior restraint upon rights guaranteed by the First Amendment in a context that permits no alternative means of expression—argue persuasively, we

---

[16] See note 13, *supra*, p. 21.

believe, that petitioners were entitled to meet the charge of violation by pleading the constitutional invalidity of the City's degree.

CONCLUSION

For the reasons stated, the judgment below should be reversed.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.
JOHN DOAR,
Assistant Attorney General.
LOUIS F. CLAIBORNE,
Assistant to the Solicitor General.

JANUARY 1967.

U.S. GOVERNMENT PRINTING OFFICE: 1967